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SELOGA JAYA SDN BHD

v.

UEM GENISYS SDN BHD

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FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
JAMES FOONG FCJ
HELILIAH MOHD YUSOF FCJ
[CIVIL APPEAL NO: 02(f)-20-2008 (W)]

C

25 JANUARY 2010

CONTRACT: *Agreement - Validity of - Whether appellant and respondent freely consented to enter into contract - Whether there was consideration or lack of - Whether contract had hallmarks of a valid agreement - Contracts Act 1950, s. 10*

D

CONTRACT: *Construction - Term of payment - Debt owing - Plain construction of words in contract - Whether there was any other form of payment or settlement except by money - Whether appellant had option to pay respondent by way of stock*

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The appellant was the main contractor for the renovation and extension of the Merlin Hotel, Subang (the said project). The owner was a private limited company known as Subang Jaya Development Hotel Sdn Bhd (owner). The owner was part of the Faber Group

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Berhad, a public listed company. The respondent was nominated by the owner as a sub-contractor of the appellant for the installation of air-conditioning and ventilation in the said project. A formal sub-contract agreement between the appellant and the respondent was executed. When all the respective works of the appellant and the

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respondent were completed but before the appellant was fully paid by the owner, the owner became insolvent. A scheme of arrangement was proposed under s. 176(1) of the Companies Act 1965 whereby Faber Group Berhad shall issue RM1 nominal amount of irredeemable convertible unsecured loan stock every RM1 of debt

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owing to the scheme of creditors (the FBG ICULS) which was then approved and sanctioned by the High Court. This resulted in a proportionate number of FGB ICULS issued to the appellant in full and final settlement of debt due by the owner to the appellant which included the amount due to the respondent under the sub-contract.

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The appellant then wrote to the respondent informing them of this and requested the respondent to disclose their Central Depository System (CDS) account number so that several units of FBG ICULS

could be transferred into the respondent's account. However, the respondent issued a s. 218 Companies Act notice to the appellant charging the appellant for the non-payment of an outstanding sum of RM1,386,646.84 due to them. This prompted the appellant to file the action against the respondent seeking, *inter alia*, a declaration that the appellant was holding 1,386,646 FGB ICULS on behalf of the respondent in full and final settlement of the subcontract works, which was soon followed by the appellant's application (encl. 3) for an interlocutory injunction restraining the respondent from winding up the appellant until disposal of this suit. In retaliation, the respondent filed a motion (encl. 12) under O. 14A of the Rules of the High Court 1980 (RHC) for this matter to be tried on a question of law and/or on the construction of the documents and agreements between the parties. The High Court heard both encls. 3 and 12 simultaneously and gave judgment in favour of the respondent in both applications. The appellant appealed to the Court of Appeal where their appeal was also dismissed. Dissatisfied, the appellant appealed to this court and raised these main grounds (i) there was no contract in law between the appellant and the respondent and even if there was an agreement, the contract could not be sustained due to lack of consideration and (ii) the courts should have interpreted that the transfer of the FGB ICULS was sufficient satisfaction of the debt due to the respondent.

Held (dismissing the appeal with costs)
Per James Foong FCJ delivering the judgment of the court:

(1) The appellant and the respondent had freely consented to enter into a contract in writing with terms and conditions governing the respective rights and obligations of the parties. The consideration in the contract was the right of the respondent to be paid by the appellant upon completing the sub-contracted works as specified subject of course to the appellant first being paid by the employer. It could not be denied that the appointment of the respondent was thrust upon the appellant by the employer but if the appellant were serious in objecting to such nomination there was very little in law the employer could do to force this upon the appellant. This contract between the appellant and the respondent had all the hallmarks of a valid agreement described in s. 10 of the Contracts Act 1950. (para 25)

(2) In both the letter of offer by the appellant to the respondent dated 30 November 1994 and the subsequent formal agreement entered into by the parties, the contract sum was explicitly

A spelled out in words as well as in figures with the currency fixed as 'Ringgit Malaysia'. Apart from this, there was no other form of payment ascribed. So upon the plain construction of these words in the contract between the parties, there could be no other form of payment or settlement with the respondent B except by money "upon receipt of main contract payment from the employer" which the appellant did when they accepted the said FBG ICULS stock. Having accepted this from the employer as payment of the main contract debt then under the terms of the sub-contract, the appellant had no option except C to pay the respondent in the form as stipulated - money rather that by the stock described. (paras 27 & 28)

Bahasa Malaysia *Translation Of Headnotes*

D Perayu adalah kontraktor utama bagi pengubahelokan dan kerja penambahan Hotel Merlin, Subang ('projek tersebut'). Pemilik adalah sebuah syarikat persendirian berhad dikenali sebagai Subang Jaya Development Hotel Sdn Bhd (pemilik). Pemilik adalah sebahagian dari Faber Group Berhad, sebuah syarikat awam bersenarai. E Responden telah dilantik oleh pemilik sebagai sub-kontraktor perayu untuk pemasangan penyaman udara dan peredaran udara bagi projek tersebut. Satu perjanjian sub-kontrak di antara perayu dan responden dilaksanakan. Apabila segala kerja-kerja perayu dan responden diselesaikan tetapi sebelum perayu dibayar sepenuhnya oleh pemilik, F pemilik menjadi insolven. Satu penyusunan skim telah dicadangkan di bawah s. 176(1) Akta Syarikat 1965 di mana Faber Group Berhad akan mengeluarkan stok pinjaman boleh tukar tak boleh ditebus bernilai RM1 nominal bagi setiap RM1 hutang yang dihutang kepada pemiutang-pemiutang skim (FGB ICULS) yang diluluskan G dan dibenarkan oleh Mahkamah Tinggi. Ini menyebabkan beberapa unit FGB ICULS dikeluarkan ke perayu sebagai penyelesaian penuh dan muktamad hutang yang terhutang oleh pemilik kepada perayu yang termasuk jumlah yang terhutang kepada responden di bawah sub-kontrak tersebut. Perayu menulis kepada responden dan H memberitahu mereka mengenai apa yang telah berlaku dan meminta responden memberi nombor akaun Central Depository System (CDS) supaya beberapa unit FBG ICULS boleh ditukar-milik kepada akaun responden. Walaubagaimanapun, responden mengeluarkan notis s. 218 Akta Syarikat ke atas perayu dan menuntut jumlah yang I dihutang iaitu RM1,386,646.84. Ini memaksa perayu memfailkan tindakan terhadap responden untuk menuntut, antara lain, deklarasi bahawa perayu memegang 1,386,646 FGB ICULS bagi pihak responden sebagai penyelesaian penuh dan muktamad kerja-kerja sub-

kontrak, yang kemudiannya disusuli dengan permohonan perayu (lampiran 3) untuk penghakiman interlokutori untuk mencegah responden dari menggulungkan perayu sementara menunggu keputusan guaman ini. Sebagai serangan balas, responden memfailkan usul (lampiran 12) di bawah A. 14A Kaedah-kaedah Mahkamah Tinggi 1980 (KMT) untuk halperkara ini dibicarakan atas persoalan undang-undang dan/atau atas pentafsiran dokumen-dokumen dan perjanjian-perjanjian di antara pihak-pihak terlibat. Mahkamah Tinggi telah membicarakan kedua-dua lampiran 3 dan 12 secara serentak dan memberi penghakiman yang berpihak kepada responden dalam kedua-dua permohonan. Perayu membuat rayuan ke Mahkamah Rayuan di mana rayuan juga ditolak. Tidak puas hati, perayu merayu ke mahkamah ini dan membangkitkan tiga alasan penting (i) tidak terdapat kontrak dari segi undang-undang antara perayu dan responden dan jikalau terdapat satu perjanjian, kontrak tidak boleh dibenarkan kerana ketiadaan balasan dan (ii) mahkamah sepatutnya membuat tafsiran bahawa pertukaran milik FGB ICULS adalah memadai untuk penyelesaian penuh hutang kepada responden.

Diputuskan (menolak rayuan dengan kos)
Oleh James Foong HMP menyampaikan penghakiman mahkamah:

(1) Perayu dan responden telah dengan rela memasuki kontrak yang bertulis dengan terma dan syarat yang mentadbir hak-hak dan obligasi masing-masing pihak-pihak terlibat. Balasan di dalam kontrak adalah hak responden untuk dibayar oleh perayu apabila kerja-kerja sub-kontrak selesai seperti yang dispesifikasikan tertakluk kepada perayu dibayar dulu oleh pemilik. Tidak boleh dinafikan perlantikan responden dibuat oleh pemilik tetapi jikalau perayu tidak mahu menerima perlantikan tersebut majikan tidak boleh dari segi undang-undang memaksa perayu untuk menerimanya. Kontrak antara perayu dan responden mempunyai ciri-ciri perjanjian yang sah seperti yang diperihalkan di dalam s. 10 Akta Kontrak 1950.

(2) Di dalam surat tawaran oleh perayu kepada responden bertarikh 30 November 1994 dan kemudian perjanjian rasmi yang dimasuki oleh pihak-pihak tersebut, jumlah kontrak telah secara nyata dinyatakan serta butiran-butiran dengan mata wang ditetapkan sebagai 'Ringgit Malaysia'. Selain dari itu, tidak ada cara bayaran lain yang diletakkan. Oleh itu berdasarkan pentafsiran perkataan-perkataan di dalam kontrak di antara

A pihak-pihak yang terlibat, tidak terdapat cara jenis bayaran atau penyelesaian dengan responden selain dari wang "apabila penerimaan pembayaran kontrak utama dari majikan" yang dilaksanakan oleh perayu apabila menerima stok-stok FBG ICULS tersebut. Dengan penerimaan tersebut dari majikan
B sebagai bayaran hutang kontrak utama di bawah terma-terma sub-kontrak, perayu tidak mempunyai opsyen lain selain dari membayar responden dengan cara yang telah ditetapkan - dengan wang dan bukan dengan stok yang diperihalkan.

C **Case(s) referred to:**
Gloucestershire County Council v. Richardson [1969] 1 AC 480 ***(refd)***
Interpro Enginerering Pte Ltd v. Shin Heng Construction Co Pte Ltd [1998] 1 SLR 694 ***(refd)***
Northwest Metropolitan Regional Hospital Board v. Bickerton & Sons Ltd [1970] 1 All ER 1039 ***(refd)***

D **Legislation referred to:**
Companies Act 1965, ss. 176(1), 218
Contracts Act 1950, s. 10
Rules of High Court 1980, O. 14A

E *For the appellant - William Leong Jee Keen; M/s William Leong & Co*
For the respondent - Hj Sulaiman Abdullah (Syamsuariatina Ishak with him); M/s Nor Azmi & Co

[Appeal from Court of Appeal; Civil Appeal No: W-02-179-2004]

F *[Editor's note: For the Court of Appeal judgment, please see Seloga Jaya Sdn Bhd v. UEM Genisys Sdn Bhd [2008] 2 CLJ 686.]*

Reported by Suhainah Wahiduddin

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JUDGMENT

James Foong FCJ:

Introduction

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[1] The facts of this case are undisputed and are relatively straightforward. The appellant was the main contractor for the renovation and extension of the Merlin Hotel, Subang (the said project). The owner was a private limited company known as Subang
I Jaya Development Hotel Sdn Bhd (owner). The owner was part of the Faber Group Berhad, a public listed company. The respondent

was the nominated subcontractor of the appellant for the installation of air-conditioning and ventilation in the said project. The respondent was nominated by the owner and in the usual course of practice in the building industry accepted by the appellant. The pertinent part of the owner's consultant letter informing the appellant of this is as follows:

> We have been instructed by our Client, Messrs Subang Jaya Hotel Development Sdn Bhd to inform you that they have selected Messrs UEM Genisys Sdn Bhd (the Respondent) to be the Nominated Sub-Contractor to execute the Air Conditioning & Mechanical Ventilation Services Subcontract work for a tender sum of Ringgit Malaysia: Two Million Five Hundred and Ninety Three Thousand Eight Hundred and Sixty Two Only (RM2,593,862.00) with a completion period of 28 weeks or to follow the main contract programme.
>
> In accordance with the condition of contract entered between yourselves and Messrs Subang Jaya Hotel Development Sdn Bhd, you are hereby instructed to accept the tender submitted by Messrs UEM Genisys Sdn Bhd and the said tenderer is hereby declared to be the Subcontractor employed by you and shall be referred to as the "Nominated Sub-Contractor".

[2] The appellant accepted the respondent as the nominated subcontractor and in paras. 10 and 11 their letter to the respondent dated 30 November 1994 listed:

> 10 You have agreed that payment will be made to you within Forty Five (45) days from the date of receipt by the contactor of any certificate of duplicate copy thereof from the Architect or until receipt of main contract payment from the Employer, whichever is later
>
> 11 In the event of any inconsistency between the terms of this Letter of Acceptance and the terms of the formal subcontract to be entered into between you and us, the terms of this Letter of Acceptance shall prevail.

[3] The respondent accepted this condition by endorsing on this letter:

> We, the undersigned, hereby acknowledge receipt of the above Letter of Acceptance, a copy of which has been retained by us, and confirm that all the terms and conditions and stipulations are fully agreed to by us.

A **[4]** Subsequently, the respondent was also nominated as the subcontractor by the owner for the supply and installation of kitchen equipment in the said project and the price for this sub-contract was RM1,060.000. The appellant accepted the respondent as their sub-contractor in much the same manner and on the same terms and
B conditions as the first appointment.

[5] A formal sub-contract agreement between the appellant and the respondent was executed on 27 July 1996 for these jobs.

C **[6]** When all the respective works of the appellant and respondent were completed but before the appellant was fully paid by the owner, the owner became insolvent. On 13 October 1999, the owner and its parent company, the Faber Group Berhad together with another associated company, Faber Hotels Holdings Sdn Bhd, (all collectively known as the Scheme of Companies) obtained an order restraining
D creditors, including the appellant (which are referred to as Scheme Creditors) from taking any action against the owner to recover their debts. This was soon followed by a proposed scheme of arrangement under s. 176(1) of the Companies Act whereby Faber Group Berhad shall issue RM1 nominal amount of irredeemable convertible
E unsecured loan stock for every RM1 of debt owing to the Scheme Creditors (the FGB ICULS).

[7] These FGB ICULS were to be listed on the Kuala Lumpur Stock

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Exchange

[8] As a result of this, the appellant wrote to its sub-contractors, including the respondent, informing of them of this offer and highlighted:

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> Strictly without prejudice to our rights and remedies in the event the Composite Scheme of Arrangement is approved (with or without modifications), we propose to settle any money payable to you in a similar form, manner and proportion as the moneys
H payable to us are settled under the said Composite Scheme of Arrangement. Kindly let us have your comments, if any, to our proposal by 20th November 1999, failing which we shall proceed accordingly on the basis that you are agreeable to our proposal and vote in favour of the said Composite Scheme of Arrangement (with or without any modifications).

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[9] The respondent replied to inform that they "are unable to accept the settlement proposal as stipulated" and "reserve all our rights at law and under the subcontract". A

[10] At a court convened creditors meeting held on 22 November 1999, the said scheme of arrangement was approved by the statutory majority of the Scheme Creditors and this was later sanctioned by the High Court in accordance with s. 176 of the Companies Act. B

[11] This resulted in a proportionate number of FGB ICULS issued to the appellant in full and final settlement of debt due by the owner to the appellant which included the amount due to the respondent under the sub-contract. C

[12] After the appellant received the FGB ICULS, the appellant wrote to the respondent informing them of this and requested the respondent to disclose their Central Depository System (CDS) account number so that 219,425 units of FGB ICULS can be transferred into the respondent's account. D

[13] The initial response of the respondent was to query the basis for the allocation of 219,425 units of FGB ICULS against the outstanding debt due to them. Despite explanation by the appellant, the respondent issued a s. 218 Companies Act notice to the appellant charging the appellant for the non payment of an outstanding sum of RM1,386,646.84 due to them. E

Actions And Applications Before The Court F

[14] This prompted the appellant to file this action against the respondent seeking;

(a) a declaration that the appellant is holding 1,386,646 FGB ICULS on behalf of the respondent in full and final settlement of the subcontract works; G

(b) an injunction restraining the respondent, its servants and or agent from filing or proceeding to wind up the appellant; H

(c) damages and costs.

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[15] This was soon followed by the appellant's application (encl. 3) for an interlocutory injunction restraining the respondent from winding up the appellant until disposal of this suit.

[16] In retaliation, the respondent filed a motion (encl. 12) under O. 14A of the Rules of High Court (RHC) for this matter to be tried on a question of law and/or on the construction of the documents and agreements between the parties.

Ruling Of The High Court And Court Of Appeal

[17] The High Court heard both encls. 3 and 12 simultaneously and gave judgment in favour of the respondent in both applications. The reasons proffered by the High Court are:

> An examination of the applicable documents before effecting section 176 composite scheme of arrangement showed that the parties intended all payment to be in monetary terms. The defendant (respondent) was not involved in this scheme. The plaintiff (appellant) variously attempted to get the defendant (respondent) to accept the FGB ICULS as payment but failed to do so. In the circumstances there was no agreement between the parties to vary the terms of the contract entered into between them to make it incumbent upon the defendant (respondent) to accept the FGB ICULS as payment for the money owed to it.
>
> As there is no dispute that the plaintiff (appellant) had been paid by the employer, it followed that the plaintiff (appellant) had to pay the defendant (respondent) for the work done by virtue of the pay-when-paid clause as per the agreement which bound them both. As the agreement referred to payment in monetary terms, the plaintiff (appellant) could not force the defendant (respondent) to accept payment by way of FGB ICULS. In these circumstances, I agree with the submissions of the learned counsel for the defendant (respondent) and allowed the application in enclosure (12) as prayed for and consequently dismissed enclosure (3) with costs.

[18] Dissatisfied with this decision, the appellant appealed to the Court of Appeal where their appeal was dismissed primarily on the following ground:

> From our reading, the words "receipt of main contract payment" must be given its normal meaning. In our view, these words simply mean receipt of money and definitely not receipt in kind. The facts showed that the respondent never made any overt or implied gesture to accept payment in kind by way of FGB ICULS.

Grounds Of Appeal

[19] The appellant raised three main grounds in this appeal:

(1) There is no contract in law between the appellant and the respondent.

(2) Even if there was an agreement between the appellant and the respondent, the contract cannot be sustained due to lack of consideration.

(3) The courts below had erred in construing the 'pay when paid' clause in the light of the factual matrix of this particular case and the custom and practice in the building industry and should have interpreted that the transfer of the FGB ICULS is sufficient satisfaction of the debt due to the respondent.

Analysis

[20] It is our view that deliberation of this appeal requires us to understand the peculiarities of the building industry concerning nominated sub-contractors, their appointment, their roles and legal implications. It is not uncommon for an owner or employer, aside from having appointed a contractor (whom we shall refer to as the main contractor) for a building project, to nominate a sub-contractor for the same project in order to carry out certain specific work or works which require certain specialised skill or technique or who possesses a certain type of plant adapted for a certain kind of work in the project. It is also not unusual, like in this instant case, for the consultant to inform the main contractor of such nomination. As the price for such subcontracted job has not been included in the main contract but will be adjusted with such nomination, the main contractor normally would not object to the appointment imposed upon him. The reasons why an employer would prefer this approach rather than leaving it to the main contractor to select his sub-contractor for the same kind of job are firstly, to give the employer a greater flexibility to select the person he prefers; secondly, to allow the employer to negotiate directly with the subcontractor for the price and terms while at the same time avoids the multiplicity of any direct contract with the sub-contractor; thirdly, by the sub-contractor coming under the wings of the main contractor would allow the main contractor to coordinate the different types of work to be carried out in the project.

[21] But such arrangement has various legal consequences. Since there is no privity of contract between the employer and the sub-contractor, going by the general principle of the law of contract, the sub-contractor cannot seek redress against the employer in the event of the main contractor failing to pay the sub-contractor for the job done after the main contractor had collected payment from the employer. Or what would happen if there is a dispute between the main contractor and the employer unrelated to the subcontract resulting in the employer withholding payment to the main contractor who in turn refused to pay the sub-contractor. There might also be a situation where the employer only made partial payment to the main contractor giving rise to a dispute as to a fair amount for distribution to the sub-contractor. These are only some of the problems. There may be many others. This list is not exhaustive.

[22] From the series of cases cited to us by both the appellant and the respondent notably: *Northwest Metropolitan Regional Hospital Board v. Bickerton & Sons Ltd* [1970] 1 All ER 1039, *Gloucestershire County Council v. Richardson* [1969] 1 AC 480; *Interpro Enginerering Pte Ltd v. Shin Heng Construction Co Pte Ltd* [1998] 1 SLR 694, the approach adopted by the courts to deal with these varying sets of situation appear to fall back onto the construction of the contract between the parties as well as their deeds and actions in that transpired. There is no universal rational principle or test laid down for general application to each of the specific problems mentioned above.

[23] To cushion themselves from excessive loss in the event of the employer becoming insolvent and when the sub-contractor has completed his work, some main contractors have resorted to drafting into the sub-contract a 'pay when paid' clause. This literally means that the sub-contractor will only be paid when the main contractor gets paid by the employer. Clause 10 in the agreement between the parties in this case is of this nature. But the issue in this case goes beyond this: can the main contractor after having been paid by the employer in the form of stocks rather than money in turn settle with the sub-contractor in the same form he obtained from the employer?

[24] Having been unfavourably adjudicated by the courts below on this issue, the appellant's initial thrust in this appeal before us is to argue that there is no contract between the appellant and the respondent and in the alternative, even if there is one, the contract is void for lack of consideration. This argument is based principally

on this odd arrangement in the construction industry where, as described above, the respondent, as a nominated sub-contractor, was virtually thrust upon the appellant by the employer. The appellant has no say on the price of the sub-contract nor the terms and conditions of work. The appellant further stressed that this arrangement of the appellant in appointing the respondent as a nominated sub-contractor was merely an administrative convenience to allow the main contractor to coordinate the works of various sub-contractors in order to be in tandem with the works of the main contractor so that the project can be completed expeditiously. There was in fact no consideration in this contract between the appellant and the respondent.

[25] We disagree with this contention of the appellant. Though this method of appointment of a nominated sub-contractor may be peculiar to the building industry we cannot discard the fact that the appellant and the respondent had freely consented to enter into a contract in writing with terms and conditions governing the respective rights and obligations of the parties. The consideration in the contract is the right of the respondent to be paid by the appellant upon completing the subcontracted works as specified subject of course to the appellant first being paid by the employer. We do not deny that the appointment of the respondent was thrust upon the appellant by the employer but if the appellant were serious in objecting to such nomination there is very little in law the employer could do to force this upon the appellant. So the appellant here cannot deny that they had not freely consented to enter into this agreement with the respondent. In fact, in our opinion, this contract between the appellant and the respondent has all the hallmarks of a valid agreement described in s. 10 of the Contracts Act which says:

> All agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

[26] This answers the first and second ground of this appeal.

[27] The essence of the third ground of this appeal is the construction by the courts below on the means of payment is wrong on the face the factual matrix of this case. Regrettably we disagree. In both the letter of offer by the appellant to the respondent dated 30 November 1994 and the subsequent formal agreement entered into by the parties, the contract sum is explicitly spelled out in

words as well as in figures with the currency fixed as "Ringgit Malaysia". Apart from this, there is no other form of payment ascribed. So upon the plain construction of these words in the contract between the parties, there can be no other form of payment or settlement with the respondent except by money "upon receipt of main contract payment from the Employer" which the appellant did when they accepted the said FGB ICULS stock.

[28] The appellant has argued before us that they have no option to reject these stocks as payment by the employer. This is not correct. From the correspondence found in the Appeal Record, we observed that the appellant did not object to this payment in the form of FGB ICULS stock nor register with Scheme of Companies their refusal or that of the respondent to accept this kind of payment. Having accepted this from the employer as payment for the main contract debt then under the terms of the sub-contract, the appellant has no option except to pay the respondent in the form as stipulated - money rather that by the stock described.

[29] With this, we answer the sole question posed to us when leave was granted for this appeal:

> Whether the defendant (respondent) is obliged to accept the form of the payment received by the plaintiff (appellant) from the employer in respect of the Air Conditioning and Mechanical Works and the Kitchen Equipment Works for the Merlin Subang (Phase 2) Project ("Sub Contract Works"), ie, in the form of FGB ICULS, instead of monies, in full and final settlement of the plaintiff's (appellant) outstanding debt to the defendant (respondent) in the amount of RM1,386,686.84 for the Sub Contract works ('the Plaintiff's debt").

[30] in the negative.

Conclusion

[31] For reasons aforesaid, we dismiss this appeal with costs of RM80,000 and the deposit for this appeal to the respondent towards account of costs.